IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 415

DOROTHY E. ROETTER,
Petitioner,

vs.

FRANK M. McKEY, Trustee of the Estate of Burt Leopold Roetter, Bankrupt,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ON APPEAL THERE FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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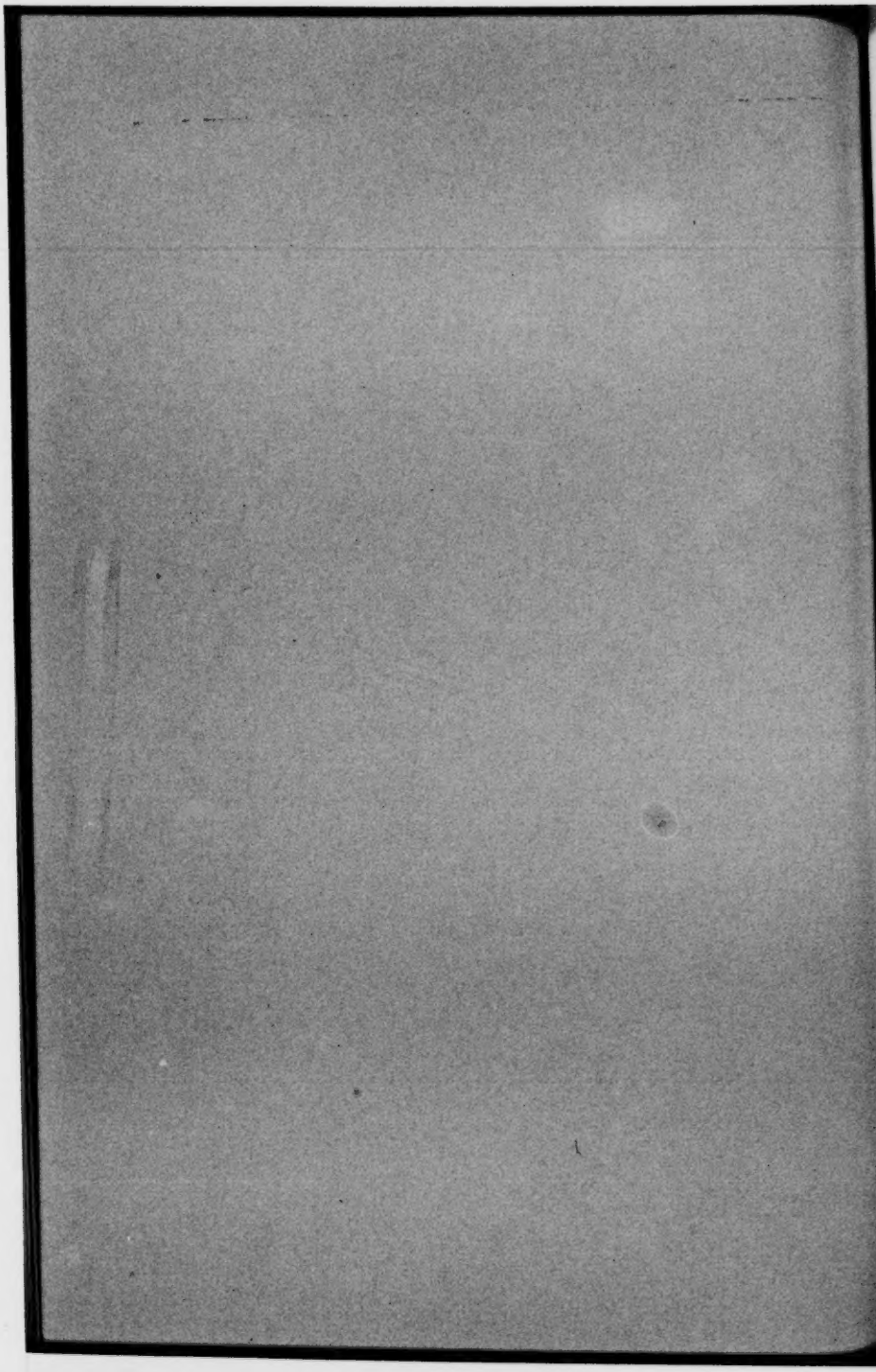

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No. 415

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vs.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

Respondent, Frank M. McKey, trustee of the estate of Burt Leopold Roetter, bankrupt, opposing the petition of Dorothy E. Roetter herein, respectfully represents unto this Honorable Court as follows:

A.

Statement of the Case.

Petitioner's statement of the matter involved (pp. 1-6) is both inaccurate and incomplete. Rather than attempt

to correct and supplement petitioner's statement, it would seem less tedious for respondent to restate the case briefly and concisely.

Prior to 1932, petitioner's husband, Roetter, owned $150,000 in bonds and stock (R. 3-5). Among the securities were two hundred odd shares of stock of the Chicago Bank of Commerce, an Illinois banking corporation (R. 12, 71, 124). In 1932 the bank closed its doors, and on the next day action was commenced by the bank's creditors to recover from its stockholders their superadded liability equal to the par value of the stock under the Illinois constitution and statutes (R. 12, 157). It was sought by the suit to recover from Roetter $20,200, the par value of the bank stock held by him (R. 159).

In 1934, while the suit against him was pending and undetermined, Roetter removed the securities from his safe deposit vault and gave them to his wife, Dorothy, the petitioner, in consideration of a promise from her that she would use the funds to support herself, their children and Roetter's mother (R. 84). Roetter at first testified he gave Dorothy everything he owned (R. 135, 136), then, later, that he had retained certain currency and negotiable securities amounting to approximately $10,000 (R. 114-117). He said he had kept the cash up behind a water tank in his home, and no one but himself knew it was there (R. 120). He admitted that the entire $10,000 had been spent by 1936 (R. 118), and he gave the bank's receiver a sworn statement in that year that his total estate amounted to $105 (R. 126, 160).

In 1938, a decree was entered in the bank stock liability suit against Roetter for $20,200 (R. 159). Three months later, Roetter filed a voluntary petition in bankruptcy scheduling the judgment against him and claiming assets of only $105 (R. 159). Upon respondent's appoint-

ment as trustee of the bankrupt's estate, plenary proceedings were instituted against Dorothy Roetter to obtain the return of the property given to her by the bankrupt (R. 2).

It was charged in the trustee's complaint that the assignments were voluntary and resulted in bankrupt's insolvency, and were calculated to hinder, delay and defraud his creditors (R. 5). Petitioner answered denying fraudulence of the transfers upon two principal grounds: that the bankrupt was not insolvent for the reason he had no creditors until judgment was entered against him in 1938; and, that petitioner's promise to support herself, bankrupt's mother and their children constituted a valuable consideration for the bankrupt's assignment of his property (R. 8-15). Petitioner disclaimed any fraudulent intent or guilty knowledge.

After petitioner and the bankrupt had testified fully concerning the transactions involved (R. 77, 105, 134), the Chancellor dismissed the suit for want of equity, apparently upon the theory that it was essential for the plaintiff to prove guilty knowledge or intent in the transferee (R. 148).

Upon review, the Court of Appeals found the defenses to the suit without merit and that the transfers were fraudulent and tended to hinder, delay and defraud bankrupt's creditors (R. 179-183). It was held that the suit should not have been dismissed, but that a decree should have been entered setting aside the transfers (R. 183).

B.

Jurisdiction.

It is conceded, of course, that this Court is empowered by section 240 (a) of the Judicial Code to grant writs of certiorari to the Circuit Courts of Appeal. It is denied, however, that the petition discloses any basis upon which the Court, under the Rules, should grant a review of the judgment in question. No special or important reasons are advanced to warrant exercise by this Court of its discretion (Rule 38, sec. 5 (b); *Deputy* v. *DuPont,* 308 U. S. 408, 500).

C.

Questions Presented.

Without referring specifically to each of the eight questions the petition purports to present, it may be said that all of the assignments are directed to matters of long established and well settled local law. Seven of the points are confined to the settled doctrine of fraudulent conveyances. The remaining question posed is whether the Court of Appeals, instead of reversing the cause and remanding with directions to enter a decree setting aside the transfers, should not have afforded petitioner the right to introduce further evidence of her defense upon the remandment. Obviously, then, this Court is not called upon by the petition either to resolve conflicts of decision or to settle important principles of law.

D.

Reasons Relied On for Allowance of the Writ.

Petitioner, in her effort to establish a ground upon which the writ might be granted, has not made clear, definite and complete disclosures concerning the controversy. Petitioner would have her attempt to obtain another hearing in this Court appear to be an application calling for the writ's issuance in order to secure uniformity of decision in the Circuits or to decide important questions in the public interest.

In this connection, petitioner refers the Court to several decisions, both of Illinois and other Circuits, which it is claimed are in conflict with the holding in the case at bar. However, an examination of the cases cited will reveal such disagreement simply does not exist. It will be noted that those decisions on fraudulent conveyances all treat with transfers upon a valuable consideration or where the grantor was not insolvent. The transaction now under scrutiny was voluntary, resulting in bankrupt's insolvency. The cited decisions are, therefore, clearly distinguishable. It will be seen, also, that the issues claimed to be of grave public importance are momentous only to the petitioner.

Prayer.

Wherefore, respondent respectfully prays that the petition for a writ of certiorari may be denied.

FRANK M. MCKEY,
Respondent.

AIKEN, MCCURRY & BENNETT,
Attorneys for Respondent.

CHARLES R. AIKEN,
Of Counsel.

Argument.

Summary:

(1) The petitioner's entire argument that there is a conflict between the opinion in the case at bar and certain decisions of Illinois and other Circuits is founded upon a fundamental misconception of the issues: In the cases referred to the conveyances were for a valuable consideration or the grantor was solvent; here, the transfers were voluntary resulting in bankrupt's insolvency.

(2) Petitioner is not entitled to introduce further evidence in support of her defense, inasmuch as the grounds thereof were fully set forth in her answer, in various affidavits and by the statements and arguments of her counsel, the bankrupt and petitioner, both, testified fully on the subject, and such defenses, upon review, were held to be without merit.

MAY IT PLEASE THE COURT:

I.

It has been repeatedly urged in the argument on behalf of petitioner that the decision below is in conflict with various decisions of Illinois courts and of other Circuit Courts of Appeal. Let us examine briefly those cases claimed to have been offended.

First, however, it must be borne in mind it was alleged and proven in the case at bar that the transfers were voluntarily made. True, petitioner denied the conclusion they were voluntary, and stated that a valuable consideration had passed, to-wit: petitioner's promise to use the property in caring for herself, the bankrupt's mother and their children. But the court below held in disposing of this contention, in conformity with the settled authority of Illinois, that a promise of future support, either of the grantor or his family or relatives, was not a valuable consideration as to creditors. (*Annis* v. *Bonar*, 86 Ill. 128;

Lawson v. *Funk,* 108 *id.* 502; *Gordon* v. *Reynolds,* 114 *id.* 118; *Harting* v. *Jockers,* 136 *id.* 627; *Davidson* v. *Burke,* 143 *id.* 139; *Auburgh* v. *Lydston,* 117 Ill. App. 574, 577.)

This same subject is treated in the following manner in *American Jurisprudence* (vol. 24, Fraud Conv., sec. 35, p. 194):

> "Ordinarily, a transfer of property in consideration of future support is held to be invalid, at any rate, as to existing creditors whose rights are prejudiced by such transfer. Thus, the transaction must be held to have been illegal where it appears that the transferrer or grantor did not retain sufficient assets to pay his debts, as where he executed a conveyance of all his property. The conclusion is the same regardless of the showing as to whether support was agreed to be furnished to the debtor himself or one who was related to him by blood or marriage."

Indeed, this Court announced the rule in *Lukins* v. *Aird,* 73 U. S. 78, where it was said (p. 79):

> "It is not important to inquire, whether, as a matter of fact, the defendants had a purpose to defraud the creditors of Aird, for the fraud in this case is an inference of law, on which the court is as much bound to pronounce the conveyance in question void as to creditors, as if the fraudulent intent were directly proved. . . . The principle on which we rest our decision it too well settled for controversy. The law will not permit a debtor, in failing circumstances, to sell his land, convey it by deed without reservations, and yet secretly reserve to himself . . . benefit. . . . A trust, thus secretly created, *whether so intended or not,* is a fraud on creditors because it places beyond their reach a valuable right . . . and gives to the debtor the beneficial enjoyment of what rightfully belongs to his creditors."

Thus, it becomes plain by the testimony of petitioner and bankrupt, themselves, that the transfers were vol-

untary. We turn now, in this light, to the cases cited in the petition.

It is claimed the ruling in the instant case, that it was not necessary to affirmatively show petitioner participated in the fraud, conflicts with *Albers* v. *Smiley,* 300 Ill. App. 66, and *Ayers Nat. Bank* v. *Barber,* 287 Ill. 182. It appears from the opinion in the *Albers case* that no insolvency resulted and that a consideration valuable in law was given. Under such circumstances, of course, it was held that no knowledge in the transferee is fatal. There was also valuable consideration in the *Ayers Bank case.* It was found in that opinion (p. 188): "The showing is that she paid an adequate consideration for the land." Obviously, no conflict is present here.

The case of *Marshall* v. *Gelfand,* 99 Fed. (2d) 85, cited by petitioner in this connection, is based upon entirely dissimilar facts, as a casual reading of the opinion will disclose. The *Marshall case,* brought under the Ohio code, turns squarely upon the question of solvency, the Court of Appeals holding that the grantor was not insolvent. This case is distinguishable, not conflicting.

Petitioner next cites the cases of *Bittenger* v. *Kasten,* 111 Ill. 260, *Mundell* v. *Craven,* 267 Ill. App. 447, and *Knowles* v. *Crow,* 289 Ill. App. 108. The *Bittenger* and *Knowles cases* are completely distinguishable inasmuch as the grantors were found to be solvent there. The following language was employed in the *Bittenger case:*

> "Where there is no fraudulent intent, and the gift or provision made by a debtor to his wife or child is a reasonable one under the circumstances, *leaving ample property unincumbered for the payment of his debts* . . . the gift or provision will be sustained."

Judgment in the *Knowles case* was reversed because it was neither alleged nor proved that the donor was insolvent at the time of the conveyance. The *Mundell case,* was a bank stock liability suit, and the decree was reversed for failure of plaintiffs to show they were creditors of the closed bank.

In *National City Bank* v. *Cowdin,* 343 Ill. 430, cited by petitioner, the indebtedness *was created more than a year subsequent to the transfer involved and its recording.* The conveyance in *Jones* v. *King,* 86 Ill. 225, was held void both as against existing and subsequent creditors on the ground a secret trust was established.

Wojtas v. *Rachel,* 267 Ill. App. 148, held the transfer created a secret trust and a benefit was retained by the donor. It was said in that opinion:

> "The owner of property may at any time give the same to anyone he chooses, *so long as he thereby injures no then existing creditor.*"

It was held in *Anderson* v. *Hultberg,* 247 Fed. 273, a case tried under Kansas law, that a valid, adequate consideration had been paid for the property. In *Horbach* v. *Hill,* 112 U. S. 144, it was held that the property in question had been "disposed of in the ordinary course of business for a valuable consideration," and it was further held that the judgment should be reversed because the plaintiff failed to show he was a creditor of the grantor at the time.

The case of *Weld* v. *McKey,* 218 Fed. 307, decided by the court below, is stressed by petitioner in her argument relative to a conflict of principle. The opinion in that case discloses that the transfers there were made for a valuable consideration. Petitioner also claims that the instant case conflicts with *McKennan* v. *Mickleberry,* 242

Ill. 117. Perusal of the opinion, however, shows the *McKennan case* was a suit for specific performance of a contract predicated upon the fraud and collusion of the defendants. In passing upon these charges, the court enunciated the ancient rule that, "Fraud will not be presumed, but must be proved, like any other fact, by clear and convincing evidence," etc. We have no quarrel with this venerable doctrine, but, certainly, it can have no application to the case at bar.

Mitchell v. *Fahler,* 210 Ill. App. 516, held that the grantor was solvent at the time of the conveyances. It was further said (p. 520):

> "A voluntary conveyance to a wife may be sustained as against creditors, *unless the circumstances attending the conveyance justly create a presumption of fraud, actual or constructive.*"

In *Kingman* v. *Mowry,* 182 Ill. 256, the transfer was held valid because a valuable consideration passed. In *Epstein* v. *Goldstein,* 107 F. (2d) 755, the transfers by the bankrupt to his wife were allowed because supported by a valuable consideration.

That there is no serious or embarrassing conflict for this Court to reconcile upon certiorari is evident, and the conclusion is inescapable that petitioner has charged these conflicts in her desperation to obtain another hearing.

II.

The statement is made a number of times by petitioner that the holding by the Court of Appeals is that petitioner's motion to dismiss should have been denied. The opinion may be searched in vain for any such ruling (R. 179-183). The pertinent language of the decision is as follows (R. 183):

> "We conclude the District Court should not have dismissed the complaint, but should have entered a decree setting aside the transfers."

Such holding, we respectfully submit, is a far cry from a ruling merely that the trial court should have denied the motion to dismiss.

It will be remembered that respondent, prior to trial of the merits, filed his petition for a summary judgment supported by affidavits and testimony (R. 19-58), and that the Chancellor's order denying such motion was assigned as error (R. 156), and presented for review (R. 155). The prayer of respondent's brief in the Court below concluded as follows:

> "We, therefore, respectfully submit that in the light of the record presented the Chancellor committed palpable error in denying plaintiff's motion for a summary judgment . . . and, inasmuch as it plainly appears from the record that all available evidence has been introduced, we respectfully pray that a decree may be entered setting aside the transfers in question as in fraud of creditors."

It is clear, therefore, that the true effect of the opinion is that the trial court should have allowed the petition for a summary judgment, rather than that the court should have denied the motion to dismiss.

This same point, that the cause should be remanded for retrial in order that (Petition, p. 27) "petitioner may be afforded the opportunity of presenting her defense," was presented to the Circuit Court of Appeals, and fully argued there. We beg leave to quote from our answer to this contention made in reply to the petition for a rehearing in the court below (R. 246-252):

> "Finally, defendant complains that the Court 'in reversing the decree with directions to set aside the transfers' has deprived her of her day in court. It

is defendant's argument that the Court held there was a 'presumption of fraud,' and that unless the cause should be now remanded so that defendant can rebut such presumption she will have been precluded from making a defense.

"Let us examine the record in this connection for just a moment. The defendant, by her answer (R. 8-15), set out at great length her defenses to this suit, in substance as follows: (1) that the transfers in question were not voluntary, but were made upon a valuable consideration, to-wit: defendant promised to use the securities given her to support bankrupt's mother, bankrupt's children, and bankrupt's wife; (2) that bankrupt was not indebted at the time of the transfers for the reason that the creditors of the bank were the bank's creditors merely and had no claim against the bankrupt until they had recovered a judgment against him; (3) that bankrupt was not insolvent at the time of the transfers inasmuch as he retained seventeen thousand dollars in assets; and, (4) that the defendant had accepted the securities from bankrupt in perfect good faith and had no knowledge of bankrupt's financial affairs or fraudulent intentions.

"Later, after defendant's motion to strike the complaint had been denied, plaintiff moved for a summary judgment. Defendant thereupon submitted her special affidavit of defense setting forth substantially the same grounds contained in her answer, but with somewhat greater particularity, and supported her affidavit with a sworn statement on the part of bankrupt to the same effect.

"Then, when the cause came on before the Chancellor for a final hearing upon the merits, defendant's counsel again presented her defense (R. 72-74), as follows:

> 'The Court: What is your side of it?
>
> 'Mr. Jones: If the court please, the facts as we think the evidence will disclose are that in 1928 the bankrupt and this defendant were married and that a short time thereafter, while they were on their honeymoon, an arrangement was

made whereby the bankrupt was to deliver to this defendant certain property in consideration of her care and any children's care that might be born of the wedding or marriage, and the care of the bankrupt's mother whom he had cared for for years prior to that time. All these properties were the properties described in the plaintiff's complaint and in 1928, 1929 and 1930 they were delivered to her, not physically but by retaining them in his safety deposit box and separating them, making a list of what belonged to her and a list of what belonged to him, and in 1934—after the children were born there were two additional items delivered in 1932 and 1933—and then in 1934 these properties were all physically delivered to the defendant and she at all times since that time has had control and management and he has had nothing whatsoever to do with it.

'Now the assignment as alleged in the complaint is denied, that is, the manner of the assignment. They were delivered but they were not given. There was a valid consideration for it.

'And in addition to that our contention is that at that time this bankrupt had no debts. This bank of which he was a stockholder closed its doors in 1932, but our contention is that any creditors of the bank were creditors of the bank and not his creditors until that was reduced to a judgment, which was in 1938, four years or more after the actual physical possession of all this property was delivered.

'And in addition to that we will show that this defendant never even knew that he had stock in the bank, never even knew that there was a judgment rendered against him until after it was done and had no knowledge whatsoever of his financial condition and no knowledge that he was ever supposed to be insolvent, until an execution was served upon him on this judgment that is involved and then for the first time she found out that he had stock and that this judgment had been rendered against him. Now, in connection with that, the stock that he had at the time the bank

closed was two hundred and two shares at fifty dollars par. The judgment was finally rendered, as I think wrongfully, for twenty thousand two hundred dollars on the theory that certain debts accrued long prior to the closing of the bank, when this stock was one hundred dollars par, and it was afterwards changed by the bank to fifty dollars par.

'Now our contention is that this man was not insolvent at that time and that he had sufficient money and property left in 1934 to pay all his debts. The fact is that he had no debts, unless the court finds that this was a debt of his at that time, and even with that he had sufficient left to pay it on at least the fifty dollar basis. There is no question about that. And so when these facts are presented we think there will be a finding for the defendant.'

"Upon the trial both defendant and bankrupt testified fully concerning these matters.

"It is manifest, therefore, that defendant has made her defense, not once, but many times. Moreover, the Court by its opinion has considered each of these defenses and has held that even though complete credence is accorded the testimony of both defendant and bankrupt, still, a good and sufficient defense is not made out.

"Nevertheless, notwithstanding this condition of the record, defendant says that if the decree is going to be reversed then the case should be sent back to the trial court with directions that the defendant may be allowed to interpose a defense to the suit! In support of her position, defendant cites Rule 41(b), (Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723c).

"That this rule has no application to the case at bar appears from the provisions of the rule itself. However, learned counsel, with obvious purpose, seek to distort the decision of this Court into one which decides merely that the Chancellor should have denied defendant's motion to dismiss.

"It is clear, of course, that the opinion is not so

limited, and it is equally plain that the rule referred to is not intended to apply to a situation such as that which exists in this record. To hold otherwise, would defeat the announced objective of the new, simplified rules of procedure (Rule 1, F. R. C. P.) that, 'these rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action', and would be *contra* to a long line of decisions on the point, to the effect that where the defendant, at the close of complainant's case has moved for a decree in his own favor, and the evidence in the record is sufficient to justify a recovery by the complainant, the reviewing court will reverse a decree in favor of defendant and remand the cause with instructions to enter a decree for the complainant. (*Laursen* v. *Memering & Co.*, 260 Ill. App. 515.)

"Indeed, the *Laursen case* is so close upon this question of procedure, we wish respectfully to quote therefrom (pp. 518, 524-525):

> 'The cause was heard upon the part of the complainant by the court. When the complainant rested his case, the defendants moved the court to find for the defendants and to dismiss the bill for want of equity. The motion was sustained and allowed by the court and a decree ordered dismissing the bill for want of equity. The case comes here on writ of error for review. . . .
>
> 'The courts do not recognize a practice of making a motion in a case on final hearing before a chancellor to dismiss the bill on the evidence submitted at any state of the case. . . . A party has a right to submit his cause to the chancellor upon the evidence adduced, if he sees fit, and the motion at the close of complainant's case, if made, was neither more nor less than a submission of the cause to the chancellor.' *Koebel* v. *Doyle*, 256 Ill. 610, 614; *Abel* v. *Flesher*, 296 Ill. 604, 605; *Thorworth* v. *Scheets*, 269 Ill. 573, 576.
>
> 'Where a motion is made by the defendant at the close of complainant's case to find a decree for the defendants, it amounts to a submission of the cause, and upon appeal, if the reviewing court decides that the evidence then in the record was

sufficient to justify a recovery by the complainant, the court will reverse the decree and remand the cause with directions to enter a decree for the complainant. Cases will not be tried piecemeal. *Koebel* v. *Doyle*, 256 Ill. 610, 614-616; *Thorworth* v. *Scheets*, 269 Ill. 573, 576-584.'

"In the case of *Street* v. *Chicago Wharfing Co.*, 157 Ill. 605, where an argument was advanced identical to that made in the present petition, to the effect that the reviewing court by its decision had deprived defendant of his day in court, the Illinois Supreme Court had the following to say (p. 615):

'It is urged it was error in the Appellate Court to remand the cause with directions to enter a decree against appellants (appellees in the Appellate Court), without giving them opportunity to introduce testimony and be heard in the Circuit Court. This claim is based on the fact that they brought forward no evidence, either before the master or at the hearing, but contented themselves with cross-examining the witnesses of appellee and objecting to its testimony. They had opportunity to produce such witnesses and such competent testimony as they desired. *Not having availed themselves of this opportunity, it must be presumed that they either acquiesced in the statements made by the witnesses introduced by appellee as true, or concluded that they could not successfully and truthfully contradict them,* and, therefore, were willing to submit the cause for decision, relying upon the claim of the incompetency and insufficiency of the evidence of appellee to establish its cause.

'As they made their bed they must lie in it. Courts will not hear causes by piecemeal. Appellants have had their day in court. If the defense they made was unsuccessful, it was their misfortune; but the fact they made a bad and insufficient defense does not give them the right to have the cause remanded for the purpose of affording them an opportunity to hunt up a better defense. Sound public policy demands that there shall be an end to litigation.' (Italics ours.)

"The grave injustice which would result from such a construction of the rule as is contended for by defendant is forcefully demonstrated in *Koebel* v. *Doyle,* 256 Ill. 610, at page 614:

> 'We do not recognize a practice of making a motion in a case on final hearing before a chancellor to dismiss the bill on the evidence submitted at any stage of the case. This cause was on hearing before the chancellor for a final decision on the merits where the parties were at liberty to introduce such evidence as they had, to establish a right to the relief prayed for or to show good defense. To permit such a motion would result in hearing a case by piecemeal, the sustaining of a motion resulting in an appeal, and on a reversal, another hearing on more evidence, followed, perhaps, by another appeal. The party has a right to submit his cause to the chancellor upon the evidence adduced if he sees fit, and the motion, if made, was neither more nor less than a submission of the cause to the chancellor.'

"To like effect, see *Thorworth* v. *Sheets,* 269 Ill. 573, 576; *Abel* v. *Flesher,* 296 Ill. 604, 605; *Union Nat. Bank* v. *Hines,* 187 Ill. 109, 114.

"Quite *apropos* to the case at bar is certain language employed in the opinion of the *Hines case,* from which we will briefly quote (p. 114):

> 'The contention . . . was made upon the former hearing, and fully argued and discussed both in the original briefs and in the petition for rehearing. Upon this question appellant has had its day in court. If the defense it made was unsuccessful, it was its misfortune; but the fact, that it made a bad and insufficient defense, does not give it the right to have the cause remanded for the purpose of affording it an opportunity to hunt up a better defense. Sound public policy demands that there shall be an end to litigation.' "

CONCLUSION.

This Court said in *Furness, Withy & Co.* v. *Yang-Tsze Assn.*, 242 U. S. 430:

> "When the real situation is not set forth by the petition a duty rests on opposing counsel to reveal it in their reply."

We have attempted to discharge our duty in this regard as it appears to us. The record abundantly supports our contention that this is not a case involving principles the settlement of which is of importance to the public as distinguished from that of the parties, or one where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal. (*Layne & Bowler* v. *Western Well*, 261 U. S. 387, 393.)

The case at bar, it seems to us, is one of those matters so often referred to by this Court, where the petitioner regards the jurisdiction to bring up cases by certiorari as having been conferred merely to give the defeated party in the Circuit Court of Appeals another hearing. The Court's most recent remarks in this connection seem timely (*Deputy* v. *DuPont*, 308 U. S. 488, 500):

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower federal courts was not intended to be exercised in every case where those courts have adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the federal courts. Our rules adopted to carry out the policy of the statutes granting the power to bring cases here by certiorari have apprised the Bar and the public that we will not take cases fully heard and adjudicated below for the mere purpose of reexamining the correctness of the result."

Respectfully submitted,

AIKEN, MCCURRY & BENNETT,
Attorneys for Respondent.

CHARLES R. AIKEN,
Of Counsel.

No. 415.

IN THE

Supreme Court of the United States

October Term, 1940

DOROTHY E. ROETTER,
Petitioner,

vs.

FRANK M. McKEY, Trustee of the Estate of Burt Leopold Roetter, Bankrupt; and ARMIN F. HILLMER, as representative of the creditors of Chicago Bank of Commerce,
Respondents.

BRIEF OF RESPONDENT ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT ARMIN F. HILLMER IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The respondent, Armin F. Hillmer, is a representative of the creditors of the Chicago Bank of Commerce whose claim has been duly allowed in the bankruptcy proceedings of Burt Leopold Roetter, a stockholder of said bank, and for whose benefit the suit of the trustee in bankruptcy to recover assets transferred by the bankrupt was instituted.

THE FACTS.

The facts are adequately and concisely stated in the opinion and are therefore not repeated.

OPINION BELOW.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

FRANK M. McKEY, Trustee of the Estate of Burt Leopold Roetter, Bankrupt,
Plaintiff-Appellant,

ARMIN F. HILLMER, et al., as representative creditors of Chicago Bank of Commerce as a class,
Additional Parties Plaintiff-Appellant,

vs.

DOROTHY E. ROETTER, et al.,
Defendants-Appellees.

No. 7206

Appeal from the District Court of the United States, Northern District of Illinois, Eastern Division.

July 3, 1940

Before SPARKS, KERNER, Circuit Judges, and LINDLEY, District Judge.

KERNER, Circuit Judge, On April 24, 1939, the trustee of the estate of Burt Leopold Roetter, bankrupt, filed a plenary action against Dorothy E. Roetter to recover certain personal property alleged to have been transferred by the bankrupt to his wife in fraud of his creditors. The cause was tried by the court without a jury. At the close of the plaintiff's evidence the court dismissed the complaint for want of equity. To reverse that decree plaintiff appealed.

The complaint alleged in substance that Armin F. Hillmer and others as representatives of all creditors of Chicago Bank of Commerce recovered a decree or judgment on September 6, 1938 in the Superior Court of Cook County, Illinois, against Burt Leopold Roetter for $20,200; that

before the rendition of the judgment said Roetter was the owner of certain personal property described in the complaint consisting of bonds, certificates of stock, and life insurance policies; that on May 22, 1934 said Roetter transferred said personal property to his wife, thus rendering him insolvent; that said transfer was without any good or valuable consideration and for the sole purpose of concealing his assets to hinder, delay and defraud his creditors.

The answer of Dorothy E. Roetter denied that the transfer was made to her with the intent to hinder and defraud creditors; denied that the transfer was made on May 22, 1934 and averred that shortly after her marriage to Roetter in 1928 and at a time when Roetter had no debts, she and her husband entered into a contract whereby she agreed to accept said property; that said property and the income therefrom would be used for her maintenance and for the care and education of any children that might be born to them, as well as for the support of Roetter's mother, and that in conformity with said agreement said personal property was transferred to her during 1928, 1929 and 1930; that because she did not have a suitable place to keep said securities she requested her husband to retain them for her; that said property was kept by her husband until May 1934 and he then delivered said securities to her.

The controlling important facts proved were as follows: on June 24, 1932 the Chicago Bank of Commerce, an Illinois banking corporation, was closed by the Auditor of Public Accounts of the State of Illinois and thereafter proceedings were instituted to enforce the superadded liability of the stockholders of the bank; Roetter, a defendant in that case, was personally served with summons on July 19, 1932 and on August 2, 1932 an attorney filed his appearance in that proceeding. Roetter denied that he authorized the filing of his appearance and that he was served with summons on July 19, 1932 and testified he was not

served until July 1934. In 1934 Roetter retained Arthur H. Jones to represent him in the bank liability suit in which a decree or judgment was entered against Roetter for $20,200 on September 17, 1938. On October 18, 1938 an execution was issued on said judgment, served upon Roetter and returned *nulla bona.* On December 15, 1938 Roetter filed his voluntary petition in bankruptcy, scheduling among his liabilities the judgment for $20,200. He was adjudicated a bankrupt and Frank M. McKey was appointed trustee. There were no assets in the estate with which to pay the judgment.

Roetter owned the securities described in the complaint, consisting of twelve issues of negotiable bonds amounting to $113,000 and certificates of stock valued at about $35,000. On May 22, 1934 he removed these securities from his rented safety deposit vault and delivered them to his wife. Up to May 22, 1934 he received all the proceeds from these securities, depositing them in his personal checking account. After delivering these securities to his wife, his entire assets did not exceed $10,000. On October 22, 1936, in a verified statement, he claimed that his entire assets amounted to $105.

Dorothy E. Roetter testified that after her marriage in 1928 her husband stated: "Dorothy, I want you to have some bonds and stocks that are mine and I want you to have them to use for the household or children that may be born and for the purpose of taking care of my mother." She also stated that the stocks and bonds were given to her not all at one time, but over a period of years, beginning in 1928; that they were kept by her husband in his safety deposit vault; that two lists were prepared, marked "Burt" and "Dot", to indicate their respective holdings and that the physical possession of the stocks and bonds was delivered to her in May 1934. She further testified that although her husband received the income from the stocks

and bonds, he turned it over to her and it was used to defray household expenses, education of the children, and maintenance of her mother-in-law.

The plaintiff contends that the evidence established that the transfer of the personal property to the defendant was fraudulent and tended to hinder, delay and defraud the bankrupt's creditors.

Firmly entrenched in our jurisprudence is the rule that the owner of property may at any time give his property to anyone he chooses, so long as he thereby injures no then existing creditors, *Bittinger* v. *Kasten, et al.,* 111 Ill. 260, 264. If, however, its legal effect works a fraud on the rights of a creditor, it will be deemed fraudulent, and such a creditor may impeach the transfer. *Moore, Admr.* v. *Wood et al.,* 100 Ill. 451; *Lawson* v. *Funk* 108 Ill. 502; *Patterson* v. *McKinney* 97 Ill. 41.

But in our case counsel for the defendant insists it was incumbent upon plaintiff to prove a case of an actual intent by defendant to defraud the bankrupt's creditors, or that she knowingly participated in the fraud, and he points to the fact that she had no knowledge that her husband had any debts or that he was a defendant in the stockholders' liability suit. We find no merit in this contention.

In discussing a somewhat similar contention made in *Lawson* v. *Funk, supra,* the court at page 507 said:

> "The authorities clearly establish two distinct grounds upon which conveyances * * * will be deemed fraudulent as against creditors: First, such as are entered into with a fraudulent intent; and second, such as, from the terms of the agreement or the nature of the transaction itself, are deemed so as a mere inference of law, without regard to the motives or actual intention of the contracting parties. In the first class of cases the fraudulent intent is always a question of fact, to be established by extrinsic proofs. In the latter, the agreement, under the circumstances shown, is

> deemed fraudulent, although the parties may have acted in the best of faith. * * * All such contracts and transactions are conclusively presumed as an inference of law, to be fraudulent, without regard to the real motives or purposes of the parties."

See also *Harting* v. *Jockers,* 136 Ill. 627; *Birney* v. *Solomon,* 348 Ill. 410-415; *Kennard* v. *Curran,* 239 Ill. 122, 129 and *Reisch* v. *Bowie,* 367 Ill. 126.

The defendant, however, makes the point that it cannot be said that the transfer of the stocks and bonds was fraudulent because plaintiff did not prove, at the time of the transfer, that the transferor was insolvent.

The liability on bank stock is contractual, primary and absolute and attaches upon its purchase. *Golden* v. *Cervenka,* 278 Ill. 409; *Babka Plastering Co.* v. *City State Bank,* 264 Ill. App. 142. It was sufficient that Roetter's liability be afterwards established, *Weller* v. *Schulte,* 137 Ill. App. 520. In the instant case the transfers were voluntary, *Moore* v. *Wood, supra,* and *Harting* v. *Jockers, supra,* and at a time when the transferor was indebted in excess of his retained assets. Under such circumstances it is not imperative that actual insolvency be proved. *Birney* v. *Solomon, supra* and *Adams* v. *Deen,* 296 Ill. App. 571.

However, the complaint alleged and the proof established that the creditors of the Chicago Bank of Commerce secured a judgment against Roetter upon which an execution was issued and returned no part satisfied and that Roetter had made a voluntary transfer of his assets without retaining sufficient property to meet his liabilities. In such a case the conclusion necessarily follows that the transfer was made with fraudulent intent to defraud, hinder or delay his creditors. *Annis* v. *Bonar,* 86 Ill. 128; *Marmon* v. *Harwood,* 124 Ill. 104; and *Lawson* v. *Funk, supra.*

We conclude the District Court should not have dismissed the complaint, but should have entered a decree setting aside the transfers.

The decree of the District Court is reversed and the cause is remanded for further proceeding in harmony with the views herein expressed.

STATEMENT OF THE CASE.

The respondent, plaintiff below, is a creditor of the Chicago Bank of Commerce, which suspended business June 24, 1932. Thereafter, suit was instituted by respondent on behalf of the creditors of the Chicago Bank of Commerce against all the stockholders to determine and recover the liabilities of the stockholders to the creditors of the bank under the Constitution of Illinois. A summons was returned served upon Burt Leopold Roetter in the summer of 1932, and an appearance was filed on his behalf shortly thereafter. In 1934 Arthur H. Jones appeared in the case for the first time on behalf of Burt Leopold Roetter. In May, 1934, Roetter transferred to his wife, Dorothy, over $100,000.00 in securities and life insurance, retaining assets of a par value less than the amount of respondent's claim, which assets were of an actual value of a substantially smaller amount. In 1936 Roetter submitted a sworn statement to the creditors of the bank asserting that his entire assets amounted to slightly over $100.00. In September of 1938 judgment was entered against Roetter in favor of the creditors of the Chicago Bank of Commerce in an amount exceeding $20,000.00. Shortly thereafter Roetter filed a voluntary petition in bankruptcy. The trustee filed a plenary action against Dorothy Roetter, the wife of the stockholder, in which this respondent joined as a party plaintiff, alleging that certain conveyances made to her by the bankrupt had been in fraud of creditors. After the answer of the defendant, Dorothy Roetter, had been

filed, a motion was made on behalf of the plaintiffs for summary judgment supported by affidavits and the testimony of the bankrupt and his wife taken at preliminary hearings in bankruptcy. To this motion the defendant filed an affidavit of defense alleging that the transfers were made in good faith and pursuant to a promise of the husband made in 1928. The affidavit further alleged that the wife had no knowledge of the husband's liability as a stockholder, that the court had no jurisdiction, that there is no diversity of citizenship, that no Federal question is presented, that the judgment against Roetter was void. The trial court denied motion for summary judgment and, upon the trial of the case at the close of plaintiff's case, which consisted largely of testimony of the bankrupt and his wife, granted a motion to dismiss the complaint for want of equity. The trustee and the respondent herein appealed to the Circuit Court of Appeals, which court reversed the order of the trial court and remanded the cause for further proceedings consistent with its opinion.

ARGUMENT.

I.

A. No proof of actual fraud on the part of the recipient is necessary where, as here, the transfers are voluntary and the donor is rendered insolvent by the transfer.

Any allegation in the pleadings relating to actual fraud on the part of the bankrupt or his wife may be treated as surplusage, since the bill alleged and the proof discloses that the transfers involved were voluntary and rendered the donor insolvent. The cases of *Albers* v. *Smiley*, 300 Ill. App. 66, and *Ayers National Bank* v. *Barber*, 287 Ill. 182, cited by the petitioner have no bearing upon this case since the court in each of those cases found that an adequate consideration was paid for the conveyances and the transfers were not voluntary but amounted to a preference

of certain creditors. There is no suggestion in this case that the recipient is or ever has been a creditor of the bankrupt. The case of *Marshall* v. *Gelfand* 99 Fed. (2d) 85 is not in point since there was lacking the proof of insolvency made in the case at bar.

II.

A. The finding of the Circuit Court of Appeals that the bankrupt was indebted when the transfers took place conflicts with no Illinois decision.

The case of *Bittinger* v. *Kasten*, 111 Ill. 260, cited by the petitioner simply holds that in that case there was no proof that the transferor did not retain sufficient assets to meet his obligations. In that case the court says at Page 266:

> "For ought that is shown in the record, Kasten may have retained at the time ample means to have met this only liability shown."

The language jerked from the context of *Mundell* v. *Cravens*, 267 Ill. App. 447, by the petitioner can hardly be construed to mean that the liability of a stockholder in an Illinois bank is not a debt of the stockholder. The Supreme Court of Illinois has stated in the case of *Golden* v. *Cervenka*, 278 Ill. 409, 435-6 as follows:

> "The stockholders' liability created by the constitution is to the creditors of the corporation, and is a several and individual liability on the part of each stockholder to each creditor. It is not a liability to the corporation or to the creditors of the corporation as a class, but to each individual creditor on the part of each individual stockholder. Therefore it is the creditors, alone, individually or collectively, who can enforce the liability by such remedies as the law affords."

Judge Kerner, who wrote the opinion of the Circuit Court of Appeals in this case, is no stranger to the law of Illinois

bank stockholders' liability, being the author of the leading case of *Babka* v. *City State Bank,* 264 Ill. App. 142. The word-juggling argument advanced by the petitioner on the strength of the single sentence from *Mundell* v. *Cravens* made no impression upon Judge Kerner.

In the case of *Knowles* v. *Crow,* 289 Ill. App. 108, cited by the petitioner, there was neither allegation nor proof that the transferor was rendered insolvent by the transfer. In the case at bar there is ample evidence to sustain the finding of the Circuit Court of Appeals that the bankrupt was rendered insolvent by the transfers attacked.

B. Rights of subsequent creditors are not in issue. The transfers attacked were made two years after suit.

The cases of *Wojtas* v. *Rachel,* 267 Ill. App. 148, *Jones* v. *King,* 86 Ill. 225, *National City Bank* v. *Cowdin,* 343 Ill. 430, have no possible application to this case, since the transactions were attacked by creditors whose claims were already in suit at the time the transfers were made, and there is no basis in the record to lend color to the suggestion that the creditors here involved are subsequent creditors. The transfers here attacked were made in 1934. The claim of the creditors accrued in 1930, and suit was filed in 1932 upon the closing of the bank.

The petitioner states that in the case of *Bittinger* v. *Kasten,* 111 Ill. 260, hereinabove referred to, a liability upon a surety bond was not held to be an indebtedness when the conveyance was made. The case did not so hold. The court merely held that since no other debts had been established and since there was no showing of the assets held by the transferor there could be no basis for a finding that the transfer rendered him insolvent.

We have no quarrel with the statement made by Mr. Justice Field of this court in the case of *Horbach* v. *Hill,* 112 U. S. 144. The creditors attacking this conveyance are in no sense subsequent creditors.

C. The claim of the creditors in this case had been reduced to judgment prior to the filing of the petition in bankruptcy.

Assuming that no Federal Court has previously decided that a judgment creditor is a creditor within the meaning of the Bankruptcy Act, we see no occasion for the iteration of such an obvious proposition. This question — which is not a question — cannot be raised upon this record since the claim of the judgment creditor has been allowed in the bankruptcy proceeding.

III.

There is neither novelty nor merit in the contention that the transfers here attacked were made upon good and valuable consideration.

Counsel makes the astounding assertion that the question of whether transfers of property made in the circumstances disclosed in this case were voluntary or for a good and valuable consideration is novel. It is difficult to find a reported case in which a voluntary conveyance when attacked by creditors is not contended to have been made upon a good and valuable consideration. The only novelty existing in this case is the fantastic story advanced by the bankrupt and his wife, which the Circuit Court of Appeals considered irrelevant even if credible. The question in any event is one to be determined only after an extended examination of the facts in this case and is not of the type which this court under its rules deems necessary to review.

IV.

The opinion of the Circuit Court of Appeals does not find that the transfers were fraudulent as a conclusive presumption of law, nor is there any conflict between such an opinion and the cases cited.

There is no basis in the opinion of the Circuit Court of Appeals for the assertion made by petitioner that the transfers here involved were conclusively presumed as a matter of law to be fraudulent. The court merely found that the claim of the creditors attacking the transaction was in existence at the time of the transfer and that the bankrupt did not retain sufficient property to discharge the obligation of said creditors and that the transfers were, accordingly, invalid as to said creditors. There is no conflict whatsoever with the case of *Weld* v. *McKay*, 218 Fed. 807, since that case involved a transfer to a creditor and there is no suggestion in this case that the recipient of the property is or ever has been a creditor of the bankrupt. The case of *McKennan* v. *Mickelberry*, 242 Ill. 117, deals with a case of actual fraud as distinguished from constructive fraud. As has been observed heretofore, actual fraud in this case is immaterial since the transfers were voluntary and rendered the donor insolvent.

There is no conflict with the case of *Mitchell* v. *Fahler*, 210 Ill. App. 516. As will be seen from the language quoted, the court there was speaking of a situation in which the transferor subsequently became insolvent. In the case at bar the transferor was rendered insolvent by the transfers attacked.

The case of *Kingman* v. *Mowry*, 182 Ill. 256, has no conceivable bearing upon this case. The court merely states that there is no absolute presumption of law that a transfer of property by a debtor to a corporation necessarily hinders creditors. There is no suggestion in this case that the bankrupt ever conveyed any property to a corporation.

V.

The evidence does not support the contention of a constructive delivery prior to 1934.

The contention that there was a constructive delivery prior to 1934 is one involving the consideration of numerous factual details and is not of the type ordinarily thought proper to be presented upon petition to this court for *certiorari.* The fairy tales of the bankrupt and his wife, even if believed and accepted in the most favorable light, amount to no more than a narrative of an uncompleted gift. The cases of *Anderson* v. *Hultberg,* 247 Fed. 273; *Epstein* v. *Goldstein,* 107 Fed. (2d) 755; and *Haskell* v. *Art Institute,* 304 Ill. App. 393, all deal with great particularity of the peculiar facts involved. The *Anderson* case and the *Epstein* case conclude that the mere fact that the husband exercises domination and control does not indicate that the property does not belong to his wife. With this proposition we are in complete accord, but in this case the husband did more than exercise control of the property. The securities, until 1934, were registered in his name; when bond coupons were collected he signed an affidavit of ownership in his own name; the securities were kept in a safety deposit box to which his wife had no access; the proceeds derived from collection or sale went into the bankrupt's account.

VI.

No question of construction of the rules of procedure is involved in this case.

It is difficult to understand petitioner's contention that there has been a denial of any right to present her defense. The order of the Circuit Court remanded the case to the trial court for further proceedings not inconsistent with the opinion. The question of whether any useful purpose is

to be served by the introduction of evidence by the defendant is one which appears to be merely an interpretation of the mandate of the Circuit Court. Respondent concedes that under Rule 41-(b) the defendant did not waive any right to put in a defense, if, in fact, the defendant had such right. The rules of procedure do not appear to give a litigant a vested right to continue indefinitely frivolous and futile litigation. There is a provision in the rules for summary judgment upon affidavit and without trial upon the facts in the usual sense. There is a further provision in the rules for judgment on the pleadings. In neither case is the defendant entitled to put the plaintiff to the needless expense of a trial to dispose of a frivolous defense. In the case at bar a motion was made for summary judgment supported by the requisite affidavits, and counter-affidavits were filed by the defendant setting up precisely the defenses argued in the Circuit Court of Appeals and fully considered by that court. The defenses raised in the answer of the defendant were the same as those passed upon by the Circuit Court. The evidence heard at the trial consisted in large part of the testimony of the defendant and the bankrupt. In such circumstances it would seem completely pointless to permit the defendant to prove matters which, even if true, are no defense. The request of the defendant for the right to proceed with pointless litigation is, however, one that has not been denied and should be addressed to the trial court, to which the case has been remanded, rather than to this court upon the assumption that the request when made will be denied.

CONCLUSION.

Inasmuch as the case presented by petitioner involves no question of novelty or importance and since the decision of the Circuit Court of Appeals is in complete harmony with the law of Illinois, it is the contention of this respondent that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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